

Larry Moyer d/b/a Moyer Trucking & Garage Service and Gary Bickel. Case 25-CA-11243

13 April 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS
HUNTER AND DENNIS

On 12 January 1981 Administrative Law Judge Robert A. Romano issued the attached decision. The Respondent filed exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions¹ and has decided to affirm the judge's rulings, findings,² and conclusions only to the extent consistent with this Decision and Order.

After the judge's decision issued, the Board in *Meyers Industries*, 268 NLRB 493 (1984), overruled *Alleluia Cushion* and its progeny and held:³

In general, to find an employee's activity to be "concerted," we shall require that it be engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself. [Footnote omitted.]

Thus, the Board no longer finds the activity of an individual employee to be concerted based on a presumption that the issue involved is of interest to other employees.

Bickel's refusal to drive the truck was not concerted activity within the definition set forth in *Meyers* and the Respondent's discharge of Bickel did not violate Section 8(a)(1) of the Act.⁴

¹ The Respondent's request that the hearing be reopened is hereby denied. We find no showing of newly discovered or previously unavailable evidence or special circumstances warranting a reopening of the record.

² The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings. The judge found that the Respondent discharged employee Gary Bickel because he refused to drive a truck and to work beyond the hours allowed by applicable law of the Federal Motor Carrier Safety Regulations of the United States Department of Transportation. Citing *Private Carrier Personnel*, 240 NLRB 126 (1979), and *Alleluia Cushion Co.*, 221 NLRB 999 (1975), the judge found that Bickel, though acting alone, was engaged in protected concerted activity because he sought to enforce statutory provisions designed for the benefit of all employees. Thus, the judge found the Respondent's discharge of Bickel violated Section 8(a)(1) of the Act.

³ *Meyers Industries*, above, slip op. at 12.

⁴ In light of this conclusion we need not pass on the Respondent's contention that Bickel was discharged because he failed to resolve a tire shortage problem and not because he refused to drive the truck.

ORDER

The complaint is dismissed.

DECISION

STATEMENT OF THE CASE

ROBERT G. ROMANO, Administrative Law Judge. This case was tried at Ft. Wayne, Indiana, on March 17, 1980. The charge was filed by Gary G. Bickel, an Individual (herein Charging Party Bickel) on August 22, 1979;¹ and complaint issued on October 17, against Larry Moyer, a sole proprietor, d/b/a Moyer Trucking & Garage Service (herein Respondent Employer Moyer). Respondent filed an answer on November 9, denying the commission of any unfair labor practices, and raising certain affirmative defenses essentially asserting that discharge was for cause. The primary issues as raised by the complaint are whether Respondent Employer discharged Bickel on August 13, and thereafter refused to reinstate him, because Bickel exercised his right to refrain from violating safety regulations and applicable law of the Federal Motor Carrier Safety Regulations of the United States Department of Transportation, and otherwise engaged in concerted activities for the purpose of collective bargaining and mutual aid and protection, in violation of Section 8(a)(1) and (3) and Section 2(6) and (7) of the Act.

On the entire record² including my observation of the demeanor of the witnesses, and after due consideration of the briefs filed by the General Counsel and the Employer on April 21 and 23, respectively, I make the following

FINDINGS OF FACT

I. JURISDICTION

Larry Moyer, a sole proprietor d/b/a Moyer Trucking & Garage Service (Employer herein) maintains a principal office and place of business at Fort Wayne, Indiana, where it engages in the business of long-distance transportation of general commodities and related services. The Employer annually receives gross revenues in excess of \$50,000 for the transport of goods from Ft. Wayne, Indiana, directly to points located outside the State of Indiana. The complaint alleges, the Employer essentially admits, and I find that the Employer is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that Larry Moyer as Respondent's owner is a supervisor and agent of the Employer within the meaning of Section 2(2) and (11) of the Act.

¹ All dates are in 1979 unless indicated to the contrary.

² The General Counsel's unopposed motion to correct the transcript and exhibit numbers, dated April 17, is granted and received in evidence as G.C. Exh. 12. The record and my own notes reflect G.C. Exhs. 6(a), (b), and (c) were not offered in evidence by the General Counsel, but were remarked, offered, and received in evidence as R. Exhs. 7, 8, and 9, respectively.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. Background

The Employer operates a small but growing trucking and garage business in Fort Wayne, Indiana. Larry Moyer is the owner of the business; and George Kandel is employed as dispatcher. Kandel testified as Respondent's witness. In the conduct of its business Respondent employs three over-the-road drivers who haul commodities in interstate commerce. The Employer additionally operates a garage in which it regularly performs repair services on its own equipment and that of other truckers. Respondent also provides reload or turnaround load opportunities for other truckers coming into its area. According to Moyer, the Employer is one of the main carriers for B.F. Goodrich Company's (Tire Division) facility (herein Goodrich), located at Woodburn, Indiana, some 17 miles outside Fort Wayne. Transmarine Freight Lines, Inc. (herein Transmarine) is claims agent for the goods which are transported by the Employer for Goodrich. Larry Arrington is traffic manager at Goodrich.

Gary Bickel was employed by the Employer in November 1978 as an over-the-road driver. Bickel was assigned regularly to operate a 1973 special cab tandem truck (equipped with sleeper berth) through the date of his alleged discharge on August 13, 1979. Bickel, prior to some earlier casual employment, had been previously employed by Renters Express where he had worked for some 14 years before being released from Renters Express in June 1977, following involvement in three accidents in a 4-month period brought on apparently by a medical condition which had caused him to black out. While employed at Renters Express, Bickel was a member of Teamsters Local 414; and after release, he remained an inactive member on withdrawal. Bickel was an experienced driver. He became the Employer's senior and highest paid driver, being paid a 29-percent commission rate. (Respondent's other drivers received 25 percent.)

As an over-the-road driver, driving in interstate commerce, Bickel was subject (as were all the Employer's drivers) to the "Federal Motor Safety Regulations and Noise Emission Requirements of the United States Department of Transportation" (DOT Regulations). Additionally, the Employer's drivers were subject to certain work rules established by the Employer, which insofar as pertinent provided as follows:

8. Any driver that pulls an unsealed load, that he's supposed to count, is responsible for any shortage, unless the load is sealed, and marked with bills.
9. You may be loaded heavy for one state or another, if you are, you'll be routed onto certain highways. If you do not go that way, or if you drive across a set of permanent scales and get caught, the fine will be yours.

Dispatcher Kandel explained the basic difference between a sealed and unsealed load as being that in a sealed load the shipper loads and assumes complete responsibility for the accuracy of the load count of items shipped. A numbered seal is then put on the trailer-con-

tained load and recorded on the bill of lading. When the shipment is subsequently delivered and unloaded, the receiver first breaks the seal, checks the number, and whether the shipment is then found short or over, the driver is not held responsible. However, Kandel also testified without contradiction that the majority of the time the driver is required to either load the shipment physically, piece by piece, or assist someone in loading it, and in doing so must make an accurate count thereof, since on being loaded, the driver has to sign receipt(s) acknowledging he has received a certain number of pieces for delivery. Goodrich shipments were not the former shipper's count and seal, but rather the latter driver's sign-off load. Moyer explained further that while Employer purchased theft/damage insurance, it could not purchase shortage insurance, and that the size of the business precluded Employer's absorption of driver shortages. Thus drivers were notified by the above rule (rule 8) that they would be held responsible in the event of any such shortage. Contrary to the General Counsel's interpretation of Employer's rule 9 as circumventing regulation, Moyer testified credibly that drivers are instructed that they have to comply with the DOT regulations which govern its hauling of freight. (The latter regulations place burden of compliance on both driver and employer.)

As noted, the complaint alleges (and Respondent denies) that Employer discharged and failed to reinstate Bickel because Bickel exercised his right to refrain from violating safety regulations and applicable law of the Federal Motor Carrier Safety Regulations of the U.S. Department of Transportation (DOT regulations), and otherwise engaged in concerted activities for the purpose of collective bargaining and mutual aid and protection, in violation of Section 8(a)(3) and (1). Respondent by answer asserts, *inter alia*, that Bickel was lawfully discharged for direct violation of Respondent's work rules, for direct insubordination, for neglect of his duties after repeated warnings, for making false statements and representations in regard to his employment activities, and because he failed to account for or attempt to correct a certain shortage of goods that he had hauled for Respondent. Respondent specifically has denied that Bickel was discharged for exercising his right to refrain from violating safety and/or DOT regulations, etc., and it affirmatively asserts that any actual regulation violation was Bickel's own responsibility and was performed contrary to Respondent's established policies.³ Finally, Respondent answers in denial that Bickel's discharge related in any way to an antinunion motive or considerations.

Preliminarily it may be observed that Moyer testified that he knew Bickel was a member of the Teamsters Union at the time he had hired Bickel and indeed that currently two of his drivers are also members of that union; and he testified that the reasons for Bickel's discharge at no time related to his union membership, or union organization of any kind; that the latter was never an issue; and that there had been no union activity or discussion of the Union before Bickel's discharge, insofar as

³ Respondent also raised certain affirmative defenses in its answer with regard to unsafe equipment which was subject matter of charge herein, but not a matter alleged in complaint, nor pursued at hearing.

he was aware. In a case, as we shall see, that has involved a significant number of factual disputes, it is nonetheless readily apparent that Bickel's union membership was not an operative factor in his discharge. Thus Bickel not only confirms he had advised the Employer of his union membership on his application, but has acknowledged that he was not active at all in union affairs during the period he was working for the Employer; and that there were never any issues between Moyer and him concerning the Union; nor was his discharge the result of any attempt on his part to engage in organized or labor union activities. It is thus apparent from the above and I readily find preliminarily on this record that Bickel's termination has been shown related in no manner to union activity or membership on his part; and thus that Bickel's discharge clearly was not shown accomplished with purpose to discourage or encourage union membership.

The primary issue between the parties may thus be refined and focused on as being essentially whether, following the occurrence of a certain shortage in a delivery, Bickel was discharged by his employer for failing to reasonably thereafter carry out his employer's instructions relative to a prompt disposition of that shortage issue, as the Employer (in substance and effect) contends; or, as the General Counsel contends, was rather accomplished by the Employer because Bickel, with his permissible driving and on-duty hours fully depleted, had then refused to continue to drive Employer's truck and trailer or work in violation of existing DOT regulations,⁴ the refusal in those circumstances being contended by the General Counsel as constituting protected concerted activity under existing Board precedent and thus it is shown that Bickel was unlawfully discharged for engaging in such protected activity.

B. The Sequence of Events Leading to the Termination of Gary Bickel

1. The August 7 Goodrich shipment to Discount Tire

Reinalt Thomas Corp., d/b/a Discount Tire Co., with offices in Ann Arbor, Michigan, operates facilities, inter alia, in Okemas and Lansing, Michigan, Discount Tire No. 11 and 15, respectively. Bill of lading dated August 7, 1979, reveals Goodrich shipped 632 tires to Discount Tire via Transmarine with the Employer acting as carrier to deliver the tires in a two-stop drop, viz, 438 tires to unit 15 (Lansing) and 194 tires to unit 11 (Okemas). On August 7, driver Bickel assisted a Goodrich checker in the loading of tires and, on completion of the loading, Bickel signed off as having 632 tires for delivery. Bickel then returned to Fort Wayne, parked the tractor-trailer at the Employer's premises in the afternoon and subsequently went home. About 9:30 p.m. that same evening, Bickel called the garage, contacting Moyer who was still there working on a race car and told Moyer that he had

forgotten to lock the truck. According to Bickel he at that time asked Moyer if he would go out and put a lock on the trailer. Though disputing certain details, at *hearing*, Moyer confirmed receiving a call from Bickel that evening reporting he had not put a padlock on the truck. However, Moyer testified that when he checked, he found that Bickel had already padlocked the truck. I credit Bickel that he made such a call,⁵ and also that when he returned the following morning his trailer was locked.

2. The events of August 8 (Wednesday)

Bickel returned to Employer's premises about 3 a.m. on August 8 and, on observing the trailer was locked, Bickel left Fort Wayne traveling on to the first scheduled stop at Lansing, Michigan, some 130 miles distant, then had breakfast, and arrived at Discount Tire unit 15 at approximately 8:30 a.m. to effect the first delivery of (438) tires.⁶ Bickel delivered 410 tires, discovering that he was 28 tires (1 pallet) short of the 438 he was scheduled to deliver at the Lansing unit 15. (The two loads were separated by cardboard/paper.)

Bickel called Fort Wayne between 10-11 a.m. and reported to dispatcher Kandel that he thought he was 28 tires short, but that he would not know for sure until he got to the next stop, had finished unloading the remaining tires, and was able to determine whether or not he was over on that delivery.⁷ Bickel proceeded to make

⁴ Moyer also recalled that at this time the Employer had another truck loaded with valuable cargo (beer) and that two trucks were on the premises with their trailers parked back to back as a (usual) security precaution. However, Bickel testified that he had parked his truck that day on the street in front of the garage and no other truck was backed up to it at the time he left to go home. Neither party offered any corroborative testimony for Moyer's recollection or Bickel's recollection as to where the truck was located. The matter is thus not free from doubt whether the parking precaution was one on this occasion subsequently made (and removed). It is clear that Moyer did deny at hearing ever having earlier denied even receiving a call from Bickel in which Bickel informed Moyer that he had forgotten to lock his trailer, and asked Moyer to do so for him, though such a denial by Moyer clearly appears in a prior statement obtained from Moyer in the Regional Office's earlier investigation of this matter.

⁵ Bickel's daily log for August 8 (R. Exh. 7), in evidence, is a separate log for a different shipper. The August 8 log for Goodrich's load is not in evidence. Bickel's daily logs otherwise for August 8-10 were offered by Respondent and his daily logs for August 12-13 were offered by the General Counsel. The record of both parties' evidence convincingly reveals that travel to Lansing had occurred as shown above on August 8. The logs for August 12-13 additionally reflect that in the period 9 p.m., August 12, and 2 p.m., August 13, Bickel had been driving and/or on duty for a period of 16 consecutive hours. Bickel has acknowledged that his logs for August 8-10 are inaccurate, asserting in offered explanation therefor that he had to turn in such logs, viz legal logs, or his employer would not pay him; but nonetheless asserts the logs for August 12-13 seemingly illegal (and inconsistently) are accurate. The Employer correspondingly questions the accuracy of the August 12-13 logs which Bickel has acknowledged were not completed until after the material events of August 13. In any event, in view of the above circumstances of seeming admission of preparation of inaccurate logs (whether with employer awareness and approval or not) for August 8-10, and in light of the obvious self-serving nature of claim that the subsequent logs for August 12-13 were accurate, I am reluctant to rely on, and specifically shall not place significant weight on, any of these logs, absent other evidence independently convincing me as to the matters they may portray.

⁷ Kandel's version (at hearing) confirmed Bickel that the first report of the shortage was received from Bickel in the morning; and Kandel re-

Continued

⁴ DOT regulation 395 essentially provides, inter alia, that a driver may not exceed 10 hours of driving time or 15 hours of on-duty time in a 24-hour consecutive period. The former limitation periods otherwise are to follow 8 consecutive hours of off-duty time, provided that in the case of sleeper berth equipment, the latter 8 hours may be accumulated in two periods of at least 2 hours each.

the final tire delivery at Discount Tire No. 11, in Okemas, Michigan, a distance of about 5 miles, arriving there still between 10-11 a.m. By noon, or shortly thereafter, Bickel had fully unloaded. The delivery at Okemas was determined to be correct. Bickel then knew he had remained 28 tires short on the earlier Lansing delivery.

Bickel called Fort Wayne and notified Kandel that he had fully unloaded and was short the 28 tires. According to Bickel, at that point he asked Kandel to call Goodrich to see if they knew anything about it; and that Kandel had in turn at that time supplied him with the phone number of a (co-op dealer) broker in Portland, Michigan, that Bickel was instructed to call to receive further directions for picking up his next assigned load at Mason, Michigan. The assigned load was to be delivered by Bickel to Woodstock, Tennessee, located near Memphis, Tennessee. Bickel called the broker, obtained the instructions, drove on to Mason (10 miles), and loaded the Woodstock shipment. However, Bickel had to then drive to Portland, Michigan (an additional 20 miles), to pick up a trip lease from the broker for the Woodstock trip. There is considerable confusion in the record otherwise as to what was the full substance of the above conversation Bickel had with Kandel on calling from Okemas, vis-a-vis conversations Bickel had with Kandel and Moyer (I find) later, which originated from Portland about 4 p.m.⁸

Kandel (again) substantiated Bickel in regard to receiving the confirming report of the tire shortage after Bickel's destination (Okemas) stop. On being advised they were short the 28 tires, Kandel also recalled inquiring of

Bickel on that occasion whether the missing pallet of tires had been on the back end of the trailer (or load) where someone could have gotten it out; and that he was informed by Bickel that this was not the case, as the pallet of missing tires would (or should) have been located three or four rows inside the trailer. However, Kandel testified that Bickel also brought up at that time that he thought that there had been a pallet of tires pulled off to one side while Bickel and the Goodrich checker were loading the trailer at the Goodrich dock.⁹ Bickel did not subsequently contest Kandel's testimony of making inquiry as to where the missing pallet of tires would have been placed on his trailer; and, significantly, Bickel's general, nonrecollective responses when questioned about having mentioned to Kandel (or Moyer) his own recollection that a pallet had been set aside during the loading process at Goodrich (as thought by him to be possible explanation for the missing tires) was simply unconvincing. I thus credit Kandel that Bickel did mention that observation initially to Kandel in the call originating from Okemas. Nonetheless I have great difficulty with ready acceptance of Kandel's hearing recollection of the remainder of that conversation and subsequent developments because of the number of clear variances between his hearing testimony thereon and his earlier statement given during Regional Office investigation; and even more so with Moyer's testimony at hearing in this area.¹⁰ Nonetheless, despite certain testimonial and statement variances of Kandel as to phone conversation with Goodrich's Arrington that day, I am convinced that contact with Goodrich's Arrington did occur and that the explanation for those variances on Kandel's part lies more in the probability that Kandel has partially misrecalled the circumstances of two such phone contacts that he had with Arrington (Goodrich's traffic manager) that day about the shortage, the first being accomplished as a result of Bickel's request made of Kandel to do so, and the second, at Moyer's later direction. (Moreover as will be noted infra, in connection with sequential conversations of August 13, this is not the only instance of a Kandel misrecollection of both order and conversational participation between these three principals. However, on the latter occasion when such was brought to his attention he readily and candidly acknowledged his misrecollection and affirmed his prior recorded recollection as accurate.) In any event, I do not believe that Kandel has simply prevaricated a Bickel-Kandel-Moyer conversation

called that at that time, after going over the counting and unloading procedure that Bickel had used, and being informed by Bickel that Bickel had counted during the unloading, and had recounted in the building, he had then directed Bickel to go on to the next and final tire stop. Kandel further explained that he knew Bickel had loaded the Goodrich shipment, and Kandel thus thought it probable that the error would not be there. There is suggestion in some of Moyer's generalized testimony that Moyer (as well as Kandel) had spoken to Bickel at this point, but Moyer's prior statement obtained during earlier Regional Office investigation of this matter records that he did not learn of the shortage until Bickel's call from Portland, Michigan, later that day at 4 p.m. On other occasion at hearing Moyer also affirmed that he had not talked to Bickel on the occasion of Bickel's first call, but that it was Kandel who had done so. Any suggestion in Moyer's testimony as to the contrary I do not credit.

⁸ Preliminarily, it may be appropriately observed that this is essentially a credibility case. There can be no question but that the record reveals there are instances of substantial inconsistency and confusion (if not contradiction) readily apparent in Kandel's and Moyer's hearing testimony (and as the same is compared with statements made earlier by each of them during Regional investigation) concerning conversations with Bickel, and Kandel's conversation with Goodrich's Arrington that day. Bickel's testimony in contrast was generally far more consistent and clear. However, Bickel in *certain* aspects of his own testimony, viz, in regard to whether an explanation was offered by him that afternoon to Fort Wayne that would account for the shortage, discussed above, is deemed not to have been fully candid. To that extent Bickel also was simply not fully convincing in his own version of the succeeding events of the remainder of that day. Thus, Bickel's version initially would have suggested there was little, if any, followup discussions that day on the shortage beyond a bare request that he call Goodrich to see why he was short. Bickel subsequently acknowledged that he did have discussion with both Kandel and Moyer (at one time) and testified that pursuant to direction he had called Goodrich immediately from the broker's office about the shortage. After full consideration of all the conflicting evidence offered, I am persuaded that the following is shown by the substantial weight of the evidence deemed credible and supported herein to be the sequence of subsequent events as they most probably occurred that day.

⁹ In contrast, prior statement of Kandel (G.C. Exh. 11) would appear to indicate the report of shortage, the review of counting procedures, the report by Bickel that a pallet of tires had been set aside, and suggestion by Bickel that they had not been put on the truck had all stemmed from the call from Portland about 4 p.m., August 8. (On the basis of the above credited testimony of Bickel, with essential hearing corroboration by Kandel, I found herein otherwise.)

¹⁰ In the main, Moyer's testimony can only be concluded on analysis of this record to have been consistently of such a transposing, self-serving, and undefining nature (in regard to conversations) as to have generated an unreliability as to his recollection of conversational specifics, a condition not otherwise enhanced convincingly by certain instances of leading questions.

about the shortage with concurrent Kandel-Arrington contact that afternoon about 4 p.m. on the shortage.¹¹

Unwieldy though it be, I address the Kandel-Moyer hearing testimony in the light of their prior statements. Kandel recalled *at hearing* that at that point of the (Okemas) call from Bickel, that Kandel had reported the situation to Moyer; that Moyer got on the phone with Bickel while Kandel called Goodrich pursuant to Moyer's instruction. According to Kandel he contacted traffic manager Arrington and told him of Bickel's report of a shortage, and related to Arrington also that the driver had said that a pallet of tires had been set to one side on the dock during loading and possibly not loaded. Kandel related (without objection) that Arrington had replied to him on this occasion that he could go out there to the dock, but pallets would be scattered all over due to the ongoing loading of other trailers; and that the best approach was to have Bickel come back *that* afternoon or the following morning and get with the dock foreman or shipping checker, go over the tickets (receipts) Bickel had signed for each pallet and possibly the checker would then remember a pallet that had been put off to one side. (Arrington did not testify.) The above response of Arrington is compatible with an early afternoon call. Kandel also relates that he reported this to Moyer; *and* testified that he did hear Moyer, when on the phone with Bickel, tell Bickel—"you do need to be back here to go through it with Goodrich." It is observed that Kandel, in his hearing testimony, did not have Arrington go *out* to the dock, though he does have Moyer still on the phone with Bickel.¹² At hearing

¹¹ To be sure, as noted, there are several instances of substantial variance in Kandel's hearing and affidavit versions of the Arrington call such as might appear to be sufficient in other case circumstances to support his general discredit as the General Counsel has urged. However, in that regard, it fairly is to be also noted that Employer regularly operates three incoming phone lines to handle the various and numerous transport service calls it routinely receives in the daily operations of its business. These lines, according to uncontested testimony of Kandel, are constantly in use by the Employer's one dispatcher, not only in servicing assignments of the Employer's three drivers (in regard to deliveries, progressive assignments, and return), related business interests in regard to other shippers and drivers coming into the area, etc. I thus bear in mind that Kandel had received many calls, oftentimes subject related. He handled additional calls on this subject in succeeding days from Bickel and Arrington. Accordingly, I am persuaded that these issues of disputed fact are more appropriately to be resolved in this instance by a comparative analysis of the substance of the (variant) versions of the call to Arrington, with a view to inherent probabilities reasonably flowing therefrom in the light of other determined circumstances. The same has led to conclusion there were more probably two such Kandel-Arrington calls, one early afternoon after Bickel's (Okemas) request, and an interrelated second call to Goodrich, during Bickel's (return message) call from Portland, discussed *infra*.

¹² In contrast in Kandel's prior statement (noted as closer to the event) in regard to the Arrington contact, Kandel does not refer at all to a three-way conversation of these principals in relation to the Okemas call, but does relate an account of a similar conversational development between these principals as occurring later, viz, as arising out of the later call received from Bickel that afternoon about 4 p.m., on the occasion when Bickel had called Fort Wayne from Portland, Michigan. However, there Kandel has recorded that Arrington actually went to look for the pallet while Kandel waited on the phone. Kandel also relates that Arrington reported back that the pallet was not there (on the dock); and that Arrington had then stated he would like to have the driver out there the next morning to get with the checker to verify the tires were left on a pallet to one side as Bickel claimed. Significantly, there he also records

Moyer confirmed that he had conversed with Bickel while he had Kandel contact Goodrich; confirmed also that Bickel had told Moyer he knew where the problem was, that he had left a pallet of tires on the dock. However, at hearing Moyer also testified that when Bickel told him on the phone that he had left the pallet on the dock, Moyer told Bickel, "Gary, they showed that you signed the form." Since it appears otherwise uncontested that Arrington did not report that tickets for all the tires were signed by Bickel until, at the earliest, in the morning of the next day,¹³ it is clear that Moyer, as well, has either had mixed recollection, or has testified disjointedly as to a substantive remark made to Bickel in a later conversation (which appears much more likely to have been the case). In any event, I conclude and find that Moyer's hearing testimony, to the extent he claims he immediately pressed Bickel with a direct instruction in that August 8 conversation to go out to Goodrich the very next morning, as opposed to directing Bickel to call Arrington at that time, in the light of all the evidence, is simply not persuasive. Rather, Bickel's version, that Moyer at all times knew and understood he planned on going on to Woodstock, appears the more probable.

In reconciling the evidence, it has appeared first entirely plausible that driver Bickel, though experiencing and reporting the shortage, on also being advised at Okemas of his next dispatch to an available load in that area and with present recollection that, during the loading at Goodrich, a pallet of the same number of (short) tires (28) had been pulled to one side, would have (reasonably) initially expected it to account for his indicated delivery shortage; and that Bickel accordingly would have likely requested dispatcher Kandel to immediately call Goodrich to see what Kandel could find out at that end while Bickel proceeded to handle his next loading assignment. It is equally probable that, with mention of such a seemingly plausible explanation being raised by Bickel, dispatcher Kandel would in turn be disposed to do so, particularly in view of Kandel's own indication otherwise that he had considered that Bickel could not make it back in time to himself check with the involved personnel at Goodrich that afternoon anyway because of the distance and their to be anticipated prior departure at shift change; especially with supportive observation that the dispatcher's view of business efficiency would appear likely to dictate to him that Bickel needed to load the Woodstock trip first while he was in the area as Kandel has essentially testified. As noted, this is not to discount entirely that a three-way conversation about the shortage later occurred (which Bickel in turn has essentially acknowledged), but rather to show base for persuasion that

that Bickel was *not* still on the phone, but had *later* called back at which time Kandel told Bickel what Arrington had said.

¹³ Moyer's earlier statement compatibly had recorded his own initial awareness of the shortage as occurring at 4 p.m., and he also there had recorded it as being after Bickel had proceeded to Portland, Michigan. Moyer's earlier (statement) version also records that it was he who had instructed Kandel at the time to call Arrington to find out not only if the tires were still on the dock, *but to additionally determine* whether Bickel had in fact *signed* tickets for all of the 632 tires. Significantly, Moyer there records Arrington advising Kandel that the tires were not there (on the dock) *and* that he would *check the tickets the next day*.

Kandel not only more probably made the first followup call on the shortage to Arrington pursuant to Bickel's request, *but* with Bickel not held on the phone; at a time, thus, when Moyer was not brought to the phone to speak to Bickel. Kandel did not deny two conversations; he was not asked. But Kandel has recalled an inquiry of Arrington when Arrington did not actually check the dock in practical recognition of difficulties of pallet identification at that time (midday) with the ongoing loading; *and* recorded an inquiry when Arrington did check the dock while Kandel waited. Such can hardly, if credited, be viewed as defeative of the inference to be drawn. I am wholly convinced that Kandel did not tell Bickel he should return to Goodrich that afternoon or the following morning in the Okemas call as Kandel and Moyer at hearing have recalled it. Rather, I am convinced that Bickel had not been kept on the phone for the result of Kandel's inquiry on that occasion, but had on his part proceeded to call Portland for pickup instructions (and had then proceeded to Mason to effect loading). However, a message was subsequently left at Portland by the Employer that, upon Bickel's arrival there, Bickel was to call Fort Wayne. Bickel asserts he did so about 4 p.m.; and I credit that he did so.

It is thus concluded and found that the conversation between Bickel, Kandel, and Moyer more probably did originate following Bickel's later return call from Portland made about 4 p.m. that afternoon, as Bickel has essentially acknowledged and the earlier statement of Moyer reflects.¹⁴ Thus it was when Bickel arrived at the broker's office in Portland, Michigan, to pick up the Woodstock trip lease, the aforesaid message was already waiting for him to call Fort Wayne as he alternatively believed had been the case; and that Bickel accordingly did so, probably shortly before 4 p.m. Before passing on to analysis of the plausible evidence as to that conversation, it is significant to bear in mind that it is uncontested of record that Bickel had made personal plans with his ex-wife for the following weekend; and (I find) he discussed the effect of those plans with Moyer before departure for the Tennessee trip and had Moyer's prior approval on them; and it is to be observed also that by this time (4 p.m., Wednesday, August 8), Bickel had already accepted and was loaded for the additional assigned trip to Woodstock (553 miles from Fort Wayne) and at Portland (150 miles from Fort Wayne) only to pick up the trip lease.

Kandel's hearing version otherwise is that he believed that either he or Moyer had asked Bickel to come back through Fort Wayne and go out to Goodrich the next morning and get the shortage problem taken care of with the checker before he went on to Woodstock, Tennessee. Bickel, however, has categorically denied he was directed by Kandel or Moyer to go out to Goodrich the next

morning. Although it would appear more likely that Kandel would have passed Arrington's suggestion on to Bickel, I am convinced Bickel was not reasonably left with any such direction by Moyer. Firstly, I am convinced that it is more plausible that Kandel would have initially relayed the suggestion of Arrington (to Kandel) that Bickel do so. I find that Kandel did do so. I find Kandel's additional testimony also credible that Bickel was (immediately) a bit unhappy over that; that Bickel told Kandel that he did not want to be out over the weekend; that doing that (e.g., stopping at Goodrich in the morning) would force him to unload in Tennessee on Friday; that he was (rather) going to go straight on to Woodstock, Memphis to be there Thursday and unload, which would give him an extra day; and that consequently he was not going to go back out to Goodrich (the next morning) to talk to them. Although acknowledging that he did not recall the exact words Bickel had used, Kandel also testified at hearing that Bickel had become belligerent at that time and told Kandel that if they wanted to get the problem worked out (at Goodrich) for them to go out and get the problem worked out.¹⁵ On this, I again essentially credit Kandel. I find that Bickel, suggested to Kandel that Kandel and Moyer work out the problem with Goodrich if they wanted to do so but in substance stated that he was loaded for Woodstock and was going straight there. I find that it was at that point that Kandel then notified Moyer of what Bickel planned to do, at which point Moyer got on the phone with Bickel. As noted, Kandel has recalled that he overheard Moyer (at least on one such occasion) say to Bickel "we do need to go by Goodrich." I am convinced that in this instance Moyer probably began his conversation by doing so. However, I am as well convinced there were then additional developments with Goodrich on the matter as a result of which Moyer did not press direction of Bickel to go there. As noted, I do not credit Kandel's hearing testimony that Kandel at that point had no more to do with the conversation. I am in that respect also convinced that Moyer's *statement* version of instruction to Kandel to call Arrington, and of Kandel report of Arrington checking the dock and determining the pallet was not there (at 4 p.m.) and that Arrington would check the tickets the next day, more accurately reflects, if not what Kandel was told by Arrington, at least what Kandel had reported to Moyer at that time while Moyer had Bickel on the phone.¹⁶ It follows that Moyer at most would have been able to inform Bickel at that time, in regard to his recollection of a pallet being set aside, that (at least) the pallet was not then still on the dock, but not whether Goodrich tickets showed that Bickel had actually signed for 632 tires, a question to be reported on the following morning. In subsequently contacting Arrington, Bickel does not assert he advanced to Arrington claim that the pallet was

¹⁴ It is notable in that context that the pertinent daily log of Bickel, though acknowledged generally by Bickel as being inaccurate, does reflect with specificity in regard to this matter (i.e., the Portland call as being made about 4 p.m.) that Bickel was loading at Mason between 2 and 3 p.m.; and thus it would appear the time involved in his subsequent proceeding on to Portland (20 miles) would have placed Bickel at the Portland broker's office close to the 4 p.m. time at which both Kandel and Moyer had otherwise earlier recorded.

¹⁵ In prior affidavit Kandel had related that Bickel had said he was loaded for Memphis, and going to Memphis; and that Bickel also had said if Moyer were so worried about the tire shortage let him go to Goodrich and check it, which specific statement Bickel has denied making.

¹⁶ Cf. *Alvin J. Bari & Co.*, 236 NLRB 242 (1978), enf. denied on other grounds 598 F.2d 1267 (2d Cir. 1979).

left on the dock, but only that he had told Arrington (then) that he did not know what happened to the tires, or where they went. I credit Bickel that when he did call Arrington immediately after his discussion with Moyer, that Arrington told Bickel simply that he would check further on the matter and get back to Fort Wayne, itself being wholly compatible with the still to be accomplished preliminary determination by Arrington as to whether or not, Bickel had actually signed for that number of tires (and/or what his checker might independently recall of the situation in the light of Bickel's report, belief, and load absence from the dock.)

Finally, not only does Bickel deny that Moyer directed him to go out to Goodrich the next day, Bickel relates that he had returned to the terminal that evening, conversed further with Moyer who urged an early start on the Woodstock trip, in order to accommodate an anticipated turn around load. Moyer has wholly denied that conversation. However, apart from this wholly disputed conversation, in the light of the questioned inconsistencies rendering not wholly acceptable Moyer's and Kandel's testimony; and in the light of other circumstances supporting Bickel's version, viz: that it was not even known by Moyer at that time that Bickel had actually signed tickets for all the pallets of tires; that the procedure was to send the driver back only as soon as practical, with consideration to be made of the Employer's small but busy and growing operation and the fact that Bickel was already loaded for a long trip, with scheduled delivery date; the consideration that Employer has not denied that it was supportive of Bickel's personal weekend plans; had an anticipated trip back; and, as discussed infra, Kandel's revealing revelation that when Bickel called in subsequently Kandel had stated to Bickel, in inquiring what took Bickel so long, that *he thought that Bickel had intended to go straight on through to Woodstock*, has convinced me that Bickel did not have a specific instruction from Moyer to delay his delivery, but rather his instruction was to call Goodrich, which I find he did, immediately, from the broker's office in Portland, Michigan. Neither do I credit Moyer's seemingly collateral advanced contention that he had told Bickel (in their conversation) to first come by the garage and he (Moyer) would go out to Goodrich with Bickel, which also does not appear in Moyer's earlier account of the matter.¹⁷ Rather I am convinced from other evidence herein that it is more probable, and I thus presently find that it was not until the next day with Employer's receipt of Arrington's report that Bickel had in fact signed for pallets for all of the tires (which still appeared to be missing) that both Arrington and Moyer had recognized they had an actual substantial problem that they had to get resolved. I have no doubt that Moyer would have then immediately offered himself to go out to Goodrich to try to resolve the problem. However, the nature of the problem

¹⁷ The latter is not reflected in Moyer's prior statement. In contrast, Moyer elsewhere hedged that, although Bickel did not say yes, he also did not say no; and that Moyer had expected Bickel to go there. In view of all the above circumstances, including Bickel's convincing denials, I am persuaded this is an instance of a loose afterthought embellishment of position on the part of Moyer, stemming rather in base from a later Moyer-Arrington conversation.

was such that (as Moyer otherwise relates he was told by Arrington was the case) Bickel had to be the one to come out to get with the checker; and stated in that (or later) conversation that Bickel would need to do so promptly because with passage of days (and the checker's continued handling of other loads), the involved checker would simply end up not remembering Bickel (and his load circumstances). From that point on, I am convinced, Moyer did press for Bickel's earliest return to the area and to Goodrich to resolve the problem.

3. The events of August 9 (Thursday)

It appears only material that Bickel left Fort Wayne about 3 a.m., on August 9, and arrived at Woodstock, Tennessee (553) miles, about 3:30-4 p.m. (about 12 hours later). Bickel relates he called in to Fort Wayne close to 4 p.m. and spoke to Kandel who wanted to know what had taken him so long, why he was not there early in the morning like they wanted.¹⁸ In passing I observe that Kandel's testimony with regard to when he also had first asked Bickel if he had contacted Goodrich, whether on August 9 or 10, was both confused and hesitant. It appears Bickel would place it in this 4 p.m. call. I find that it was during one of the calls of August 9, and more probably the 4 p.m. call, that Bickel informed Kandel that he had contacted Goodrich. Contrary to Moyer's summation of that call, viz, that Bickel had reported that they had the problem worked out, it is much more plausible that Bickel reported to Kandel only what Arrington had last told Bickel, viz, that after Arrington checked on it further, Arrington would contact Fort Wayne (Employer).¹⁹ Significantly, Kandel has also confirmed that during his first conversation with Bickel he mentioned to Bickel that *he thought Bickel was going to go straight on down*, and that Bickel replied he did, but ran into some bad weather. Thus as earlier noted, I am persuaded that though there may have been, at best, an initial direction by Kandel on the previous afternoon that Bickel go out to Goodrich that morning, not only Moyer, but Kandel as well, after their prior conversations of the day before,

¹⁸ Bickel's log shows comparable trip time of 11.5 hours, though with starting on-duty time shown as 8:30 a.m. and arrival time as 8 p.m. Despite such log entries, I find on the weight of the evidence that Bickel had called on arrival for unloading at 4 p.m., Thursday, as essentially otherwise confirmed by Kandel. However, at hearing, Kandel recalled it as being about 1 p.m. that Bickel had previously reported in from some place in Illinois, just about 50 miles north of Memphis. At that time Kandel inquired of Bickel if he was going to get unloaded that day; and Bickel replied yes. (In a prior statement Kandel referred to having received a check-in call from Bickel earlier, between 10 and 11 a.m., in which Bickel wanted to know if they had the return load for him from Memphis back to Fort Wayne.) I thus note that (in whichever earlier conversation) Kandel told Bickel that they did not, and that as soon as he got empty he should see what he could find on his own. At that point Bickel knew he did not have the anticipated return trip load to Fort Wayne.

¹⁹ However Bickel's conversation would have been after Arrington had already contacted the Employer. Thus explanation of Moyer's contra-recollection here may well lie in simple misunderstanding generated by Bickel making his report of contact (the night before) after Arrington had already called the Employer that day. In any event I credit Bickel in this instance, noting Moyer's earlier statement placed Arrington's call at 9 a.m.

were well aware and understood that Bickel was going to drive on directly to Woodstock, Tennessee.

Although at one point Kandel appears to indicate that Bickel did not finish unloading that afternoon; he elsewhere has Bickel calling back empty that day; and Kandel otherwise recalled that he was busy that day trying to arrange a return load for Bickel because (as noted) the return load from Memphis had not materialized when the involved shipper did not make the anticipated shipment. I thus find that Bickel did advise he had called Goodrich by 4 p.m., and credit also the latter, viz that Bickel did call back again when empty, at which time he spoke to Moyer. Before leaving the subject of Kandel's efforts to find Bickel a return load, it is significant to also observe that, although Kandel was aware (if not Thursday, then Friday) of a trip load from Kansas City then scheduled to leave Sunday (midnight) to arrive back at Fort Wayne on Monday, he did not offer *that* trip to Bickel at the time because he knew Bickel wanted to be home for the weekend. Instead Kandel instructed Bickel to also look around himself for a return trip, a customary procedure.

The Employer reports receiving the call from Arrington while Bickel was en route to Memphis. Although Moyer relates that the call was received by Kandel, there is record indication that Moyer was on an extension for the call. In any event, Moyer alone has testified thereto. Unfortunately, Moyer's testimony in relation thereto, when not led, is disjointed, in part clearly contradictory both as to circumstances of placement and of substance. The several versions seemingly proffered, at best, again present suggestion of what may have been hearing amalgamation of several conversations on succeeding days. In one such version, Moyer relates that after Bickel had reported on the phone that he had called Goodrich and that they had the problem taken care of, they (Employer) got right on the phone and had called Goodrich only to find that the problem was not in fact taken care of, thus compounding misunderstanding.

I have earlier found that in a conversation with Arrington, probably about 9 a.m., Thursday morning, Moyer was advised that Bickel had signed a ticket for the missing pallet of tires; and that Moyer offered to go out to Goodrich to see where the problem was. However, Arrington dissuaded Moyer from doing so, Moyer relating (I find credibly) that Arrington told him that there was no use in his coming out there; that (i.e., finding a missing pallet) would be like finding a needle in a haystack; and that they would have to have Bickel there because he had to get with the checker with whom he had loaded. Thus, I view it as being highly probable that Moyer in his first conversation with Bickel that afternoon (4 p.m.) would take that occasion to stress to Bickel the now determined and significant circumstance that Goodrich had a ticket for the missing pallet of tires, which ticket was signed by Bickel. In short, Bickel and Moyer were chargeable for the missing tires. According to Moyer (whom again in this instance I credit) Bickel repeated he had left the pallet of tires on Goodrich's dock; and said that he was not going to pay for them. I find that Bickel also told Moyer that he would take care of the problem when he got back. I also find probable,

and credit Moyer that thereafter, in succeeding days (and I find particularly Friday), Goodrich (and Transmarine) began to press Employer for a speedy resolution of the missing tire problem. It is also likely that they held up on payments as Moyer testified. However, I specifically otherwise do not (selectively) credit, from Moyer's contradictory versions, other features of Moyer's conversations with Arrington (or Transmarine), extending beyond the above findings (which are deemed supported by the record and probable) that essentially in the succeeding days the Employer did have followup conversations in regard to what Employer was proposing to do in resolution of the above problem, including heightened interest in Bickel's availability to Goodrich, as requested.²⁰ In that connection, Moyer testified he had another conversation with Arrington in which Arrington said he wanted the driver there the next morning. I credit Moyer's testimony of personal observation that, from where Bickel then was, there was no way he could be back in time to see Arrington the next day (Friday). I am thus persuaded that Kandel (and Bickel) made continuing effort (with Moyer's approval) to get Bickel a direct return load. I conclude and find, however, that when Bickel called in on Friday, with both Kandel and Bickel still unable to find a load, Moyer at that point raised assignment of the load coming from Kansas City to Fort Wayne, even though it meant Bickel would be out over the weekend.

4. The Kansas City load

When Bickel called in at 6:30 p.m. Friday, Moyer took the call. Moyer testified that he had asked Bickel to bring the Kansas City load back because it would put Bickel in Fort Wayne on Monday instead of Bickel trying to be reloaded from Memphis on Monday, with no assurance he would be able to do so. (By this time Moyer had been warned of the disadvantages of too much delay in Bickel's getting with the checker.) With agreement over an allowance of \$100 for deadheading to Kansas City (457 miles) from Memphis (Woodstock), I find Bickel agreed to take that trip load, though he understood it meant he would not return for the weekend.²¹

Bickel's above assignment was to pick up a load of stage props at the Starlight Theater in Kansas City, and to transport them to the Folinger Theater in Fort Wayne. Bickel arrived in Kansas City about 11 a.m. on Saturday, August 11; and he reported his arrival there to

²⁰ Inter alia, Moyer's version that when Bickel called back empty at 4 p.m., Moyer asked Bickel why he had not stopped and taken care of the Goodrich problem; and Bickel's asserted response as simply being that he was not going to be stuck out on the weekend is specifically not credited.

²¹ Again there was conflict as to whether Moyer had simply directed Bickel to take the Kansas City load which would require Bickel to be out over the weekend, or whether Bickel voluntarily requested it. Bickel did not testify he was prepared to deadhead back to Fort Wayne under his changed circumstances when the anticipated Memphis return load simply failed to materialize, and he found the \$100 allowance for a deadhead to Kansas City acceptable. I am thus wholly convinced that the Kansas City assignment and acceptance was raised because of changed circumstances, was mutually beneficial, and was accomplished by mutual agreement.

Kandel about noon. Bickel then went off duty until Sunday night. Kandel did not work Sunday.

Bickel had been scheduled to begin loading at 10:30 p.m.²² At 9 p.m. Bickel started back on the clock, first inspecting his truck. About 9:30 p.m. he drove from the truck parking lot, where he had been waiting, across town to the Starlight Theater, allowing himself time for arranging parking there. Bickel arrived early and determined that loading would not begin until later. Bickel waited from 10:30 p.m. to midnight before commencing loading. Loading took 1 hour and 15 minutes. According to Bickel, whom I credit, pursuant to Moyer's instruction, Bickel called Moyer at his home to advise Moyer that he was ready to leave. Since Bickel knew the distance, and required driving time, before leaving he also inquired of an (unidentified) person at Kansas City as to what would be the latest time that he could timely effect the delivery at the Folinger Theater; and he was informed 1 p.m. Bickel left Kansas City at 1:30 a.m., August 13. Bickel drove straight through to Fort Wayne (585 miles). There is conflict as to when Bickel arrived at destination.

5. The events of August 13, Monday

According to Bickel he arrived at the Folinger Theater in Franke Park, Fort Wayne, at approximately 1 p.m. Bickel testified that he had then been on the clock for about 16 hours and had driven for 12 hours. If so, he was out of allowed work (clock) time and out of (driving) hours under DOT regulation 395. Bickel's version of the events that followed is that, when he arrived at the theater and obtained docking instructions, he called the garage and reported to Kandel. Kandel wanted to know where Bickel had been, and what took him so long to get there. Kandel told Bickel he had to be at Goodrich at 1 p.m. to load tires. Bickel replied he had been on the clock for 16 hours, he was out of hours, and he was tired and was going to bed. Kandel inquired if Bickel was going to go load the tires. Bickel responded he was still waiting to unload and would call Kandel back when he was unloaded; and he hung up on Kandel. By the time Bickel had driven around and backed up his truck to the dock, Kandel called back. Kandel again asked Bickel if he was going to load the tires. Bickel replied he was not, he was going to go home and go to bed. Kandel told Bickel to get his things out of the truck; that Moyer would be out with an outfit and would go himself. Bickel denies that Kandel had told him they wanted Bickel to go out to Goodrich to straighten out the shortage.

To begin with Kandel has testified there were three phone conversations that he and Moyer held with Bickel

at Franke Park that morning.²³ However, Kandel has exhibited clear confusion in the record in testifying thereon; e.g., *inter alia*, in initially describing Moyer as the conversant with Bickel in a third conversation (rather than himself) and correlatively in misrecollecting and describing what he had said therein as spoken in an asserted second conversation by Moyer. Kandel acknowledged his error after review of his prior statement. As thus corrected and otherwise clarified in cross-examination, Kandel's version of these conversations is as follows.

Kandel recalled it as being before lunch (noon) that Bickel had reported his arrival at Franke Park in Fort Wayne. Kandel testified that he initially had asked Bickel to take his truck out to Goodrich for a load of tires. (Although a city-based trailer was apparently normally used, the record otherwise reveals that Employer's yard truck was down at the time.) At hearing Kandel related that Bickel had replied he had just come in from Kansas City, had been up for 12 hours; stated he was tired; but said, "Well, he wasn't going to load the load and he wasn't going to take the load." Kandel told Bickel he would have another driver out there to load the trailer, but they had to get the tire problem straightened out, it could not go on any longer, that Bickel could (then) either bring the truck back, or go to bed, but he had to get the tire problem taken care of first. (Bickel denies there was any mention of another driver on the phone.) Kandel relates that Bickel replied that he was not going out to Goodrich, he was not going anywhere; and that with that Bickel hung up on Kandel. However, Kandel later conceded that in prior statement (after review) that he had only recorded that he had asked Bickel to take the truck out to Goodrich and get the shortage problem straightened out; told Bickel that he would have another driver meet him there (in regard to tire load); stated that Bickel could bring the driver's vehicle back to the shop; and that Bickel had said he was tired, he had just come from Kansas City and he was bringing the truck back to the yard and going home. Kandel relates that, after Bickel hung up on him, he reported the conversation to Moyer. Kandel called Bickel back in about 5-10 minutes, and Kandel relates that Moyer spoke to Bickel.

Moyer testified that he had made the Kansas City run to Fort Wayne some 500-600 times, and that he knew Bickel would be tired, but that they also had a problem that had to be taken care of. Moyer relates that he knew Bickel frequently would not accept Kandel's directions but would ask to talk to Moyer. On this occasion Moyer felt that Bickel would do as Moyer asked; and so elected to also talk to Bickel.

Moyer's version of the second call is thus that he told Bickel he wanted Bickel to take the truck out to Goodrich to straighten out the tire load and told Bickel that someone would meet him there; but Bickel said, "No." Moyer relates he explained to Bickel how important it

²² I credit Bickel in this regard. In contrast Moyer asserted that he had instructed Bickel, on Sunday, that loading was not to begin until after the last show, at midnight. Moyer also instructed Bickel that the load had to be delivered by noon, Monday, August 13. In the light of the distance to be traveled (585 miles), the scheduled time of arrival, and the circumstance indicated of record that this was a new account and uncontroverted evidence that special attention was given to it, I am convinced that it is more probable that Bickel would have been given the earlier time by Moyer as the time to be in place prepared for loading, as promptly as possible.

²³ Moyer has also referred to a conversation with Bickel when Bickel called in from a rest area on I-69. However, Moyer's versions of the substance of that call from Bickel (on different occasions reported as spoken/heard by Moyer, or Kandel, or through Phillips, with Moyer under a truck) are simply too contradictory to be credited.

was to get it taken care of; but that Bickel was very upset and with cursing Bickel said he was not going to do anything; he was going to go home and go to bed.²⁴ Moyer also testified Bickel then hung up on him. Moyer nonetheless asserts he was not angry over that, which was natural for Bickel, but that he was angry because he did not want to see Bickel pay for the problem he did not take care of. On rebuttal Bickel has denied there were three conversations and he has specifically denied having the above phone conversation with Moyer at all.

Kandel relates that he heard Moyer say to Bickel on this occasion that it was as far to bring the truck to the yard as to go to Goodrich; ask Bickel to take the truck to Goodrich and straighten out the problem, and say that Bickel did not have to take the truck out there.²⁵ (In fact Kandel's earlier statement makes no reference to provision being made by Employer for Bickel to get to Goodrich other than by Bickel driving.)

Finally, after noted testimonial correction on review of prior statement, Kandel asserts it was he who spoke to Bickel in the third conversation and that he told Bickel on that occasion to remove his (dirty) clothes from the truck; that Moyer was bringing another driver over there who would take the truck on to Goodrich. As noted, Kandel concedes that his prior statement does not refer to any provision theretofore made for Bickel to get to Goodrich other than by his driving the truck there. I am convinced there was none.

Moyer arrived at Franke Park accompanied by driver Phillips. Bickel's version is that Moyer asked Bickel if he was going to go out to Goodrich and load the tires, and Bickel again refused, stating that he was tired and out of hours and out of time, and that he was going home to bed. Moyer then directed Phillips to take the truck on to Goodrich. Bickel denies that Moyer told him that he did not have to load the tires or drive the truck. Moyer and Bickel then started back to the terminal together in a car driven by Moyer. Bickel also asserts that they did not bring up the tire shortage problem until they were back in the garage.

Moyer's version essentially is that he told Bickel that Phillips would drive the truck over there and load the

tires; and that Bickel did not have to do a thing but go in and take care of the tire problem. Moyer also asserts he told Bickel that Bickel could ride with the other driver; and that Moyer would pick him up or have someone else pick him up. (As noted by the General Counsel such offer does not appear in Moyer's prior statement.) According to Moyer, Bickel refused, saying he was going home, as before, but said nothing to him about being out of drivers' hours. Moyer then directed Phillips to take the truck on to Goodrich.²⁶ According to Moyer, Bickel became madder as his truck pulled out. Moyer then said to Bickel, "let's go back," and they both got in the car.

Bickel's version of their conversation in the car is that there developed an argument over why he would not go out and load the tires, with Bickel arguing he had been out over the weekend and he wanted 2 days off. Finally, Moyer told Bickel to get out of the car. Moyer's version is that as they were driving, Bickel became cursingly abusive about the tires. Moyer said he was not going to listen to this; and while momentarily stopped about 1-2 miles from the shop Bickel had asked to be let out; and Moyer accommodated Bickel. (However on other occasions and in statement Moyer acknowledged it was he who had said to Bickel though in the above circumstances that Bickel could get out and walk, and Bickel did.)

As compared with Bickel's prior assertion that there was no discussion about his not going out to straighten out the shortage, upon Bickel's arrival back at the terminal Bickel related (seemingly revealing strain in catching himself) Moyer wanted to know again "why I did not—would go to load the tires."²⁷ According to Bickel, Moyer then said Bickel would never drive another piece of his equipment *as long as Bickel lived*. Bickel asked if he was fired. Moyer replied he sure was. Bickel then asked for his check. Moyer replied he did not have any money coming until the shortage was straightened up. Bickel told Moyer the ICC, DOT, and the Board would have something to say about it.

As noted, Bickel asserts it was not until at the garage that they had first discussed straightening the shortage. Thus Bickel testified that Moyer then said that he was going to have somebody go out with him, all he had to do was straighten the tire deal up. Bickel said he was not going to do it then because by the time he got there everybody would have gone home on shift change. (Bickel asserts he did not complete unloading until 2 p.m.; and (in regard to clocktime) testified that there was no way he could have driven out and returned in an hour.) Moyer's version is that when Bickel arrived back at the

²⁴ In contrast Moyer's statement reflects simply:

I said I didn't want him to load tires just to take the truck out there and get the shortage solved. Bickel said he wasn't going anywhere but back to the shop and then home to bed. Then he hung up on me. Moreover, although Moyer at one point also related that in this conversation he had asked Bickel would he take care of the problem if the Employer's driver took Bickel to Goodrich and that Bickel replied he was not going anywhere but home to bed, Moyer on cross-examination would place these statements as occurring later in a face-to-face conversation occurring later between Moyer and Bickel at Franke Park.

²⁵ Kandel otherwise testified, however, that Moyer had told Bickel that he did not have to take the load, which Kandel did not think Bickel had been told before. Moreover, Kandel (though appearing to initially place it in third conversation) appears to relate that Moyer also told Bickel in that conversation that all he had to do was go to Goodrich and get with the checker before he went home, that he wanted Bickel to do this and, if he did not, then he would not drive another truck until the problem was taken care of. In contrast, Kandel's prior statement records that, after Moyer stopped and said Bickel had hung up on him, Moyer instructed Kandel to call Bickel again and inform Bickel either to take the truck to Goodrich or remove his clothes from the truck and he would bring another driver over to take the truck to Goodrich. Kandel also records that Moyer left before Kandel contacted Bickel.

²⁶ The load was loaded by Phillips that day, but delivered by another driver the next day.

²⁷ Bickel elsewhere referred to discussions about a deal for payment for the tires. Also in contrast Moyer's affidavit provides in regard to the prior car conversation:

I asked Bickel why he didn't want to go to take care of the tire problem. He said he had to go home and go to bed, he might do it later in the afternoon. He said he wasn't paying for any tires. Bickel got very agitated and began yelling and cursing. I said I was tired of it, we had to take care of the tires. He continued yelling about not paying for the tires, etc. I said I didn't have to take this from him, he could get out and walk. He said stop the car, he would. I stopped and he got out. [Emphasis added.]

garage Moyer told Bickel that he would not drive another piece of his equipment *until he took care of the tire problem*. Bickel responded by telling Moyer he would show Moyer, saying, "I'll give you more heartache than you ever had in your life." Leaving momentarily, Moyer has Bickel return and say, "I'm going to the Labor Board and I'll stop you"; that he was going to bring up everything he could and put Moyer out of business; and that Moyer then replied if Bickel was more his age, they would be rolling on the ground. Though testifying on other matter in rebuttal, Bickel did not deny making such statements.

Bickel also testified that he has not been paid for his trips, or been back to the Employer since August 13. However he testified he did go out to Goodrich on August 15 (Wednesday). He spoke to Arrington and the two motor operators. He spent 2 hours there, but they did not find the tires. They said that 28 tires was like a drop in the bucket to them; they did not know anything about the tires; and essentially since he had signed for the tires he was responsible. Bickel otherwise acknowledged that the company rule did require him to make accurate counts of the loads he hauled; that there was a discrepancy, not verified as the shipper's or receiver's mistake, and it was the driver's responsibility.

Moyer acknowledges that Bickel was not paid essentially for his trips of that week, but notes that the tire shortage was \$1226.50, and several trips (even more than those relating to Bickel) were held back on him; asserting further that Bickel still owed him a balance of about \$760.²⁸ It is also Moyer's contention that he did not tell Bickel directly that he was fired; Moyer testifying that he has never fired anyone before. However this was the Employer's first instance of both a substantial and unresolved tire shortage; and only one where the driver had refused to go back to shipper. There had been other shortages, including a tire shortage subsequently. The latter (16-18) tire shortage was resolved by the involved driver going out to Goodrich promptly. However, in the latter instance the driver had *not* signed for the tires.

Analysis, Conclusions, and Findings

On Thursday morning Moyer was informed that Bickel had signed for the (still) missing pallet of 28 tires. Moyer recognized immediately that this meant potentially that the Employer itself would be primarily liable to Goodrich (via Transmarine as established claims agent) for a then imprecisely known, but correctly anticipated to be substantial amount of money (as it turned out, \$1226.50), though Bickel would then in turn be secondarily liable therefor to the Employer under application of its work rule 8. Although Employer's operation at the time was one that was busy and growing, it also was small and not of sufficient stature to absorb driver shortages generally, and specifically not one of that substantial a nature. The only approaches open to Moyer for an avoidance of the aforementioned potential loss would be for Bickel to get together with the Goodrich checker

promptly and by going over their last load procedure and related paper work hopefully either help to locate the tires, or be able to explain the indicated shortage otherwise to Goodrich's satisfaction; or, failing that, for the Employer to have Bickel acknowledge his own liability as driver, and to accept a full responsibility for the future substantial charge. But Bickel remained adamant to Moyer, even in the face of the reported confirmation that he had signed for the pallet of tires, that Bickel had left the pallet on the Goodrich dock, and that he was consequently not going to pay for those tires. With Bickel unloading at Woodstock, Tennessee, at time of their discussion late that Thursday afternoon, it was also recognized by Moyer that there simply was no way that Bickel could reasonably be expected after the more than 12-hour trip to Woodstock, Tennessee, to make a return trip to Fort Wayne (553 miles) in time to be able to meet with Goodrich personnel the following Friday morning, as it reasonably appears Arrington had last requested be done. Moreover, what is clear from the subsequent Kansas City assignment by the Employer is not that the Employer was required to utilize Bickel for that trip due to a lack of availability of other drivers, for the contrary is shown to be the case on this record, viz, that Employer already had truck and driver (Phillips) standing by for that assignment. Thus what has discernibly emerged from all the above circumstances of the Kansas City assignment is that, when neither Kandel or Bickel were able to arrange a return load from Memphis, Tennessee, Moyer had acted to bring Bickel back to Fort Wayne as quickly as he could in keeping with his own business opportunity. It is thus simply implausible in the above-determined background that the Employer in directing Bickel to go to Goodrich for a load on his return to Fort Wayne on Monday would not have at that time pressed Bickel during its conversations with a direction to get with Goodrich and get the tire shortage straightened out as Kandel and Moyer in substance have testified, rather than as Bickel recalled, only doing so in Bickel's last conversation with Moyer in the garage. Bickel's testimony thereon was independently not convincing. I do not credit Bickel in that aspect of his testimony. I rather find that Bickel was told *inter alia* to go there and get the tire shortage straightened out with Goodrich.

On the other hand Bickel has testified, I find, otherwise generally credibly as to the circumstances of his return to Fort Wayne. Thus Bickel was no doubt disappointed over the nonmaterialization of the anticipated Memphis return trip, and with Kandel's and his own inability to replace it on Friday, the loss of his planned weekend. In those circumstances, his agreement to an acceptance of the Kansas City load nonetheless served his own purpose of a desired return to Fort Wayne as soon as practically possible.²⁹ Bickel has also otherwise testi-

²⁸ On August 23 Transmarine notified the Employer that its liability was \$1226.50 which would be deducted from the Employer's open trip lease.

²⁹ Not only did Bickel not testify as to any intention to deadhead back for the weekend, that such was not his actual intention is itself reasonably to be inferred from his conduct in remaining in the Memphis, Tennessee area, searching unsuccessfully for a return load through Friday evening, before seeking or acquiescing in an acceptance of the alternative available Kansas City trip load, a load which notably at that time would return him to Fort Wayne earlier than an alternative Monday load would, even were the latter certain to materialize at the time, which it was not.

fied with both supportive and plausible detail that in making the Kansas City trip he had been more than 15 hours on the clock and has unquestionably established that he had driven more hours (12) in that period than the (10) driving hours the regulations allowed, all by time of his arrival at Franke Park. Employer's evidentiary offerings in attempted reduction of such clock period simply wholly have failed of persuasion for any such reduction (even absent any consideration of a further reasonable clocktime allowance for a directed-additional driving out to Goodrich, problem inquiry and return);³⁰ and notably was not even attempted as to driving time, itself. Finally Kandel's and Moyer's variant recollections, particularly in relationship to the latter consideration, viz, that Employer's position eventually was that Bickel was not being required to drive the truck to Goodrich after all (or to drive back) was strained, inconsistent, and nonconvincing. I do not credit their testimony in that aspect. Thus, although I have credited Kandel and Moyer that Bickel on this occasion was directed to straighten out the problem with Goodrich, essentially doing so on basis of strong probability from attendant circumstances that was the Employer's intention, I credit Bickel as well, that he was directed to drive out to Goodrich for a load and he refused to go to Goodrich, or anywhere but back to the yard, in substance and effect asserting reason being that he was tired from the Kansas City trip, was out of hours, and was going home and going to bed. I further conclude, in any event, that the Employer was chargeable on the facts of this record with an awareness, and indeed was actually aware that Bickel, in making the Kansas City trip, was tired, and had depleted driving hours allowed by applicable DOT regulation. I further conclude and find that Bickel was discharged for refusing to immediately take the truck to Goodrich for the load, as well as the shortage. I base such conclusion on the following factors: I find that Bickel was told in substance and effect to either take the truck to Goodrich, or remove his clothes from the truck (he regularly drove); that he thereafter refused to take the truck to Goodrich, and did remove his clothes; that an argument continued between Moyer and Bickel over his refusal to drive to Goodrich and immediately take care of the problem, with Bickel also then expressing unwillingness to pay for all the shortage by himself. In that context I find Bickel's testimony that he was told that he would never drive for the Employer again as the more likely, particularly in view of the Employer's announcement that all his trip checks were to be withheld towards payment of the shortage loss. The case appears to thus come down to point of law, viz was Bickel's refusal, to continue to drive (or work) further at that time, a protected concerted activity as the General Counsel contends, such that his discharge therefor was unlawful. The critical consideration need not be belabored. I am convinced that such element of refusal to drive to Goodrich that afternoon in *inextricably* enmeshed in the causation

³⁰ Such would appear to be additional on-duty time whether to be considered on-duty time in transportation, or nontransportation work. See G.C. Exh. 9, Federal Motor Carrier Safety Regulation Interpretations (Chap. VI, part 395, Hours of Service of Drivers, par. 7, sec. 2.c. and e).

of his subsequent termination. With that determination it follows, in view of existing Board precedent, that the General Counsel's position must prevail in the matter.

Thus the fact that Bickel here acted alone is not dispositive of the issue of concerted activity where consent and concert of action emanates from an assertion of statutory rights designed (inter alia) to enhance employees' safe working condition, *Alleluia Cushion Co.*, 221 NLRB 999 (1975). There the Board noted, "[W]here an employee speaks up and seeks to enforce statutory provisions relating to occupational safety designed for the benefit of all employees, in the absence of any evidence that fellow employees disavow such representation, we will find an implied consent thereto and deem such activity to be concerted." It would seem hardly questionable that all the Employer's drivers have such an interest in those very same DOT regulations which inter alia are clearly designed for their occupational safety in the transport of goods in heavy equipment on the highways of this country. The General Counsel correctly observes that under established Board precedent the Act's protection has been held to extend to an employee's (driver's) refusal to carry out a specific order of instruction which, if in fact carried out, would be in violation of such a statutory law, absent malicious motivation on the part of the employee which I find is not shown applicable herein. *Private Carrier Personnel*, 240 NLRB 126 (1979). See also *B & P Motor Express*, 230 NLRB 653, 654 (1977). I thus conclude and find that the General Counsel has made out a prima facie case that the Employer by terminating its driver Gary Bickel on August 13 because he refused to drive and work beyond hours allowed by applicable law of the Federal Motor Carrier Safety Regulations of the United States Department of Transportation has terminated its driver Bickel for engaging in protected concerted activity in violation of Section 8(a)(1) of the Act.³¹ As Respondent has not shown that the same termination action would have taken place even in the absence of protected conduct, I find the Employer has by such action violated Section 8(a)(1) of the Act. *Wright Line*, 251 NLRB 1083 (1980). As noted, contrary to the General Counsel's urgings, I conclude and find in the light of all the above evidence that the General Counsel has not established a prima facie case of violation of Section 8(a)(3) of the Act in the termination of driver Gary Bickel. I shall recommend that that complaint allegation be dismissed.

³¹ Cases cited by the Employer not involving such statutory considerations are deemed inapposite. It would appear that Respondent's other arguments that ICC and DOT are more appropriately responsible for enforcing compliance with their regulations is an argument which has already been considered and heretofore found to be not dispositive of protected concerted activity issues. In any event, I am governed by existing Board precedent in the matter, *Fred Jones Mfg. Co.*, 239 NLRB 54 (1978). Respondent's other urgings with respect to alleged deficiencies in Bickel's past conduct as contributing to Bickel's discharge without merit, and if anything depict vacillations supportive of other reason, viz that found herein. As in *Alleluia Cushion*, supra, the instant case did not involve consideration of a collective-bargaining agreement. Id. at 999 fn. 2. With regard to the Board's accommodation to statutory scheme involving another aspect of the national labor policy, see also *Self Cycle & Marine Distributor Co.*, 237 NLRB 75 (1978).

CONCLUSIONS OF LAW

1. Larry Moyer d/b/a Moyer Trucking & Garage Service is an employer engaged in commerce within the meaning of Section 2(6) of the Act.

2. By discharging driver Gary Bickel on August 13 because he refused to drive and work beyond hour allowed by applicable law of the Federal Motor Carrier Safety Regulations of the United States Department of Transportation, the Employer has terminated its driver Gary Bickel for engaging in protected concerted activity in violation of Section 8(a)(1) of the Act.

3. Respondent has not otherwise violated the Act as alleged in the complaint.

REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I find it necessary to order the Re-

spondent to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

It having been found that the Respondent has wrongfully discharged its employee Gary Bickel for exercising his Section 7 protected rights, in violation of Section 8(a)(1) of the Act, it will be recommended that Respondent offer Gary Bickel immediate and full reinstatement and make him whole for any loss of pay or other employment benefits he may have suffered as a result of the unlawful discharge. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and *Florida Steel Corp.*, 231 NLRB 651 (1977).³²

[Recommended Order omitted from publication.]

³² See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).